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In the

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1437

CAROL C. JOHNSON
Petitioner,

vs.

JOHN J. O'CONNOR AND ELIZABETH J. O'CONNOR
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

BRIEF FOR RESPONDENTS IN OPPOSITION

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The opinion of the Superior Court is unreported, but is included in the plaintiff's petition for certiorari at p. 14(a). The opinion of the Supreme Court of Connecticut is reported in 37 *Connecticut Law Journal* No. 4 and set forth in toto in appendix to the petition, p. 1 (a).

JURISDICTION

The petitioner claims jurisdiction is involved under 28 USC 1 257 (3), Supreme Court Rule 19 on the basis that a title, right, privilege, or immunity specially claimed under the Constitution of the United States is at issue.

QUESTION PRESENTED

The question presented is whether the action of the Supreme Court of Connecticut in sustaining the trial court's conclusion that the plaintiff failed to sustain his burden of proving the facts and circumstances necessary to establish a right of adverse possession or prescription constituted an unconstitutional taking of the plaintiff's property by a denial of equal protection of the laws and by a denial of due process.

CONSTITUTIONAL PROVISION INVOLVED

Petitioner claims that the judgment made and entered by the Supreme Court of the State of Connecticut is in violation of due process and equal protection provisions of the Fourteenth Amendment of the Constitution of the United States.

STATEMENT OF THE CASE

This litigation concerns the ownership of a small triangular piece of residential property located on Linden Avenue in the Town of Branford, Connecticut. The plaintiff and defendants are adjoining property owners, R. p. 75, and the land in dispute runs the length of their common boundary and is 12.3 feet wide at its base, R. p. 76. The property in question is part of a larger plot of some 200 or more acres which was leased in

1866 for a period of 99 years to a predecessor in interest, who, in turn, entered into various sub leases, R. p. 74. In 1926 the plaintiff's predecessor in interest acquired one of these sub leases, R. p. 76. In 1950 the First Ecclesiastical Church (the owner of the reversion) instituted procedures designed to dispose of their interest at the time of termination of the long-term underlying lease, R. pp. 74-75. The entire tract was subdivided, R. pp. 75-77. In 1952 the defendants grantor purchased the remainder interest in a piece of property which approximated in boundaries the property that they also occupied by virtue of a leasehold, R. p. 50. In 1953 the plaintiff purchased the remainder interest in land which approximated in boundaries the land he occupied by virtue of a leasehold, R. p. 77. Both the deeds of the remainder interest to the plaintiff and the deed of the remainder interest to the defendants contained the following language:

> "It is expressly understood and agreed that said premises are subject to certain leases of record and that the Grantor expressly reserves to itself, its successors and assigns all rights which it now has to receive and/or be paid rent on existing leases and that nothing in this deed shall be in any way construed or interpreted so as to effect or invalidate in any way any of the terms or conditions of said existing leases referred to whether those of the Grantor or others and that the Grantees herein shall to the extent provided by said existing leases continue to pay rent for the terms thereof and as provided therein to the parties entitled thereto." R. pp. 78-79, 82.

On August 25, 1970 the plaintiff (then represented by counsel) commenced an action claiming title by adverse possession (later amended to include a claim for an easement by prescription) in a triangular piece of land included within the

property in which the defendants had record title. A trial, with the plaintiff represented by counsel, was held in the Superior Court in and for New Haven County.

In the course of that trial the plaintiff made claim for title by adverse possession or an easement by prescription with respect to a triangular piece of land 12.3 feet at its base and approximately 163 feet along its easterly boundary, coming to a point, with the other leg of the triangle being slightly longer than 163 feet, R. p. 76, Find. 12; R. p. 77, Find. 18. This disputed triangle was within that portion of the property to which the defendants had record title. The plaintiff made various claims as to the use of the disputed property made by him during the period 1926 to the commencement of suit, including the establishment of a survey line, Draft Find. 11, R. p. 39, cultivation and use, Draft Find. 18, R. p. 41, walking on the property, Draft Find. 44, R. p. 46, use by workmen in repairing his property, Draft Find. 45, R. p. 47, the growing of flowers. Draft Find. 46, R. pp. 47, 48 and the cutting of grass, Draft Find. 47, R. p. 48. However, the court only found that the plaintiff walked across the area in question and that he failed to establish where or on what portion of the area he walked, Findings 38 and 40, R. p. 83, and that he and people in his employ, upon occasion, cut the grass. but that same grass was also cut by the defendants, Findings 41 and 42, R. p. 83. The court also found that the plaintiff failed to pay taxes on the property in dispute, Find. 26, R. p. 80, that he never excluded anyone from the property in question, Find. 44, R. p. 84, that he did not fence in the property in dispute, Find. 45, R. p. 84, that he never leased out the property in question, although he did lease the balance of his property. Find. 46, R. p. 84, that he offered to buy the disputed property from the

defendants, Find. 48, R. p. 84, that he made no claim to the general public that the area in dispute was his, Find. 47, R. p. 84, that there were no physical indicia of his claim and no evidence to mark his claimed boundary, Find. 49, R. p. 84, and that any use he may have made of the property made no visible changes in the disputed area, Find. 52, R. p. 85. On the other hand, the trial court found that the defendants paid the taxes on the area in question, Find. 53, R. p. 85, that the defendants mowed the grass in the area in question, Finds. 54 and 55, R. p. 85, that, until 1969, they maintained a boundary of white stones in the area in question, Find. 56, R. p. 85, that the defendants used the area in question for passage, sunning in their own chairs, making repairs to the house, cooking and just plain sitting, Find. 57, R. p. 85, that the defendants maintained rose bushes and a lilac bush and disposed of dandelions, fertilized and pruned the contested area without interference from anyone, Finds. 59 and 60, R. p. 86, that the defendants ordered the plaintiff off the area in dispute on at least one occasion, Find. 58, R. p. 85. On the basis of this disputed testimony the trial court reached the decision that the plaintiff had failed to establish his case by a fair preponderance of the evidence, Find. 64, R. p. 86. From that decision the plaintiff appealed to the Supreme Court of the State of Connecticut, which affirmed *per curium* the lower court's decision, denied a motion for re-argument and, from those actions of the Supreme Court of Connecticut, this petition was taken.

ARGUMENT

I.

THERE IS NO FEDERAL QUESTION IN ISSUE HERE

The fundamental issue here involves the location of a boundary line that divides two pieces of residential property in the Town of Branford, State of Connecticut. It is undisputed that the disputed triangle lies within the boundaries of a piece of property to which the defendants have record title. The only way that the plaintiff can acquire an interest in that real estate is by adverse possession of prescription. This is controlled by Section 52-575, General Statutes of Connecticut, 1958 Revision, which reads as follows:

> "52-575 Entry Upon Land To Be Made Within Fifteen Years
>
> No person shall make entry into any lands or tenements but within fifteen years next after his right or title to the same first descends or accrues; and every person, not entering as aforesaid, and his heirs, shall be utterly disabled to make such entry afterwards; and no such entry shall be sufficient, unless an action is commenced thereupon and prosecuted to effect within one year next after such entry; but, if any person who has such right or title of entry into any lands or tenements is, at the time of the first descending or accruing of such right or title, a minor, non compos mentis or imprisoned, he and his heirs may, notwithstanding the expiration of such fifteen years, bring such action or make such entry at any time within five years next after full age, coming of sound mind or enlargement out of prison, or his heirs shall, within five years after his death, bring such action, or make such entry and take benefit of the same; provided the limitation herein prescribed shall not begin to run against the right of entry of any owner of a remainder or reversionary interest in

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> real estate, which is in the adverse possession of another, until the expiration of the particular estate preceding such remainder or reversionary estate. (1949 Rev. 8314.)"

The trial court and the Supreme Court of the State of Connecticut predicated their decisions upon the application of the evidence to this statute and the established case law which has developed around it. This is a question of state law. *Donahue* v. *Vosper,* 243 U.S. 59, 65-66; 61 L.Ed. 592, 597; 37 S Ct 350. It is not converted into a question of federal law merely because the plaintiff claims that he was deprived of a title, right, privilege or immunity specially set up or claimed under the Constitution. At no point has the plaintiff established by credible evidence that he had any interest in the land in question. He had a right to bring a law suit, with a hope that he might win. He exercised that right. A trial took place. He did not win. An appeal was taken. He did not win. It has been determined that, as a matter of fact, he failed to establish that he had a property right. If he did not have anything he was not deprived of anything.

II.

The Constitutional Question, If Any, Is Not Properly Raised

No constitutional claims were raised during the course of the trial. The claims of law raised by the plaintiff at the time of trial are set forth in Finds. 83-95, R. pp. 89-93. There are no constitutional questions set forth there. To the extent that the Draft Find. 136, R. p. 69 attempts to raise a constitutional question, the trial court refused to find that such an issue was raised during the trial. Nor was any constitutional question considered by the Supreme Court of the State of Connecticut.

True it is that, after preparation of the appeal papers, in the plaintiff's Assignment of Error No. 14, R. p. 97, the plaintiff attempted to raise such an issue. However, insofar as this assignment concerns the function of the trial court in weighing the evidence and applying the facts to the law, this question was considered by the Supreme Court of Connecticut as a matter of state law and decided as a matter of state law without ever reaching a federal question. *Johnson* v. *O'Connor, et al,* 37 Connecticut Law Journal p. 4, Appendix A, p. 1(a)-2(a) of Petition for Writ of Certiorari to the Supreme Court of the State of Connecticut. In his motion to reargue the plaintiff makes a vague claim of unconstitutionality. Petition for Certiorari, Appendix D, p. 8(a). However, the specificity required by *Herndon* v. *Georgia,* 295 U.S. 441, 443; 79 L.Ed. 1530-1532; 55 S. Ct. 794 is not present. Under these circumstances, there is no federal question to provide a basis for the granting of certiorari. *Beck* v. *Washington,* 369 U.S. 541, 553-54; 8 L. Ed.2d, 98, 109; 28 S. Ct. 955.

III.

The Decision Below Was Clearly Correct

In this case the petitioner is attempting to establish, either title by adverse possession or an easement by prescription. In either event, under the law of the State of Connecticut, he has to establish that his use of the land in dispute was open, visible, notorious, adverse, exclusive, continuous and uninterrupted for a period of fifteen years under a claim of right. *Arcari* v. *Dellaripa,* 164 Conn. 532, 536, 325 A.2d, 280; *Andrzejczyk* v. *Advo Systems, Inc.,* 146 Conn. 428, 431, 151 A.2d, 881; *Aksomitas* v. *South End Realty Co.,* 136 Conn. 277, 281, 70 A.2d, 552. The trial court found that the plaintiff failed to sustain

his burden of proof to persuade the court as to the existence of these ultimate facts. The Supreme Court of the State of Connecticut considered the issues of fact raised by the plaintiff and found that the ultimate conclusion of fact reached by the trial court, that the plaintiff had failed to establish by a preponderance of the evidence his claims that he had acquired title by adverse possession to the triangular plot of land abutting his land on the left and belonging to the defendants, and, in the alternative, that he had acquired a prescriptive right of way or easement over the same premises, was supported by the evidence. *Carol C. Johnson* v. *John J. O'Connor, et als, supra.* This court does not review findings of fact which have been considered by two lower courts. *Dower* v. *Richards,* 151 U.S. 658, 663, 38 L.Ed. 305, 307; 14 S. Ct. 452. The entire question here is a question of proof and a question of credibility and the courts of the State of Connecticut found that the plaintiff failed to sustain the burden of proof imposed upon him.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

NORMAN ZOLOT
Counsel for Respondents